

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1140

To be argued by
MICHAEL B. MUKASEY

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United States Court of Appeals

FOR THE

SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,
against

DAVID STIRLING, JR., WILLIAM G. STIRLING,
HAROLD M. YANOWITCH, EDWIN J. SCHULZ,
and RUBEL L. PHILLIPS,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT RUBEL L. PHILLIPS

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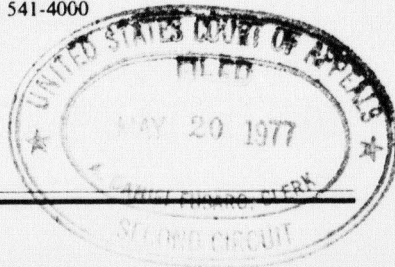


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PRELIMINARY STATEMENT

Rubel L. Phillips appeals from a judgment of conviction entered on March 11, 1977 following a five-week trial before the Hon. Marvin E. Frankel and a jury. Mr. Phillips and his four co-defendants were convicted of violations of provisions of the securities laws (15 U.S.C. §§77q(a) and 77x), the mail fraud statute (18 U.S.C. §1341), and conspiracy to defraud the United States (18 U.S.C. §§371, 1001). Mr. Phillips was sentenced to 10 months and fined \$5,000 on each of counts one through eight of the indictment, the sentences to run concurrently, and to a one year period of probation to follow his release. Imposition of sentence was suspended as to count nine. Mr. Phillips is on bail pending appeal.

QUESTION PRESENTED

Whether it was error to deny Mr. Phillips' motions for a severance pursuant to Fed. R. Crim. P. 14.

THE FACTS

The facts, so far as they relate to Mr. Phillips and to the issues raised on this appeal, and viewed as required in the light most favorable to the Government, are as follows:

A. *Background and Summary*

Stirling Homex Corporation, established in 1968, manufactured prefabricated modular housing at a plant in Avon, New York. David Stirling was the company's board chairman and chief executive officer. William Stirling, his brother, was the company's president. Harold M. Yanowitch, a lawyer, was executive vice president and functioned as company counsel. Edwin J. Schulz was the company's comptroller. All were located in Avon.

In June, 1970, Rubel L. Phillips, a Jackson, Mississippi lawyer, was retained by the company.

Stirling Homex relied substantially on federal funding to finance the purchase by its customers, such as local housing authorities and others, of its modular houses. Among the ways Stirling Homex secured such financing was to assist in the creation of a local non-profit public benefit corporation that would be eligible for federal financing, help that corporation, once created, to apply for federal financing, and then sell the modular units to that non-profit corporation. In November, 1970 Stirling Homex decided to help establish such a corporation in Mississippi. It was incorporated as Greater Gulf Coast Housing Development Corporation ("Greater Gulf").

The Government's case against Mr. Phillips was based on circumstantial evidence, relating to his role in the execution of certain contracts, assignments, auditor's confirmations and letters pertaining to Greater Gulf, as well as the direct testimony

of W. T. Richardson, supported by a prior consistent statement by Richardson to one Kenneth Dean, to the effect that Mr. Phillips had admitted procuring a forged \$15 million commitment letter from the Farmers Home Administration to Greater Gulf, which letter bore Mr. Richardson's signature as Assistant State Director of that agency. This letter, committing federal financing for a project of Greater Gulf, was shown to the company's auditors who then allowed Stirling Homex to take into income anticipated profits from a contract between Stirling Homex and Greater Gulf wherein Greater Gulf agreed to buy the modules for that project from Stirling Homex, as well as an anticipated financing fee under a related contract between Greater Gulf and U.S. Shelter Corporation, a Stirling Homex financing subsidiary. Mr. Richardson testified that Mr. Phillips, a day after his alleged admission, proposed and helped effect a cover-up of the alleged forgery.

Mr. Phillips explained his involvement in the execution of the various documents alleged by the Government to constitute circumstantial evidence of his involvement in the scheme charged in the indictment. Central to his explanation was his uncontradicted testimony that he was unaware of the unusual accounting methods being applied by Stirling Homex and its auditors. In addition, he denied any part in procuring the forged commitment letter, and denied his alleged confession to Mr. Richardson and the subsequent attempt to cover up. He introduced both testimonial and documentary evidence contradicting Mr. Richardson's testimony and showing Mr. Phillips' behavior to be inconsistent with a scheme to defraud. Finally, there was introduced no memorandum or other document either to or from Mr. Phillips mentioning the existence of the commitment letter.*

* Indeed, there was no testimony or documentary evidence presented as part of the Government's case showing any communication whatever, whether written or oral, between Mr. Phillips and Stirling Homex with respect to the alleged commitment letter. Harold Yanowitch, a co-defendant and Mr. Phillips' superior in the legal department of Stirling Homex, did testify, or at least implied, that he discussed the letter with Mr. Phillips. Of course, the defenses of Mr. Phillips and Mr. Yanowitch were in substantial conflict.

B. The May 28, 1971 Exchange of Letters

On March 16, 1971, Mr. Phillips, as attorney for Stirling-Homex, wrote a letter to Leo Seal, one of the organizers of Greater Gulf, guaranteeing that all housing units manufactured under an 800-unit contract between Stirling Homex and Greater Gulf would be manufactured in Mississippi. (GX256) At the trial, Mr. Phillips testified that in May 1971 Mr. Yanowitch told him that this requirement of the units being manufactured at a plant in Mississippi was "hindering efforts of U.S. Shelter in securing a financing commitment" but that the units would in fact be manufactured in Mississippi. (Tr. 4966) Mr. Phillips, according to his grand jury testimony read into the trial record by the Government, believed there was no affirmative requirement that the units be manufactured some place other than Mississippi, and that the objection, therefore, was confined to the contractual nature of the requirement. (Tr. 1871-1875)

Assured by Mr. Yanowitch that the Mississippi plant would ultimately be built and the 800 units manufactured there (Tr. 4966), Mr. Phillips proceeded to engage in what he thought at the time was a minor subterfuge to get around a technical bureaucratic objection to the contract: he solicited and received from J. Ruble Griffin, attorney for Greater Gulf, a waiver of the clause requiring Mississippi manufacture, and gave in writing a reassurance that the units would in fact be manufactured in Mississippi. (GX 238-239) When Mr. Phillips reported that exchange to Mr. Yanowitch he rejected it as "entirely unacceptable" (Tr. 4964) and the letters simply remained in the files of Mr. Phillips and Judge Griffin until they were turned over to the SEC. (Tr. 4963)

ARGUMENT

The District Court Erred in Denying Mr. Phillips' Motion for a Severance.

The indictment contains nine counts, all of which are based upon seven paragraphs of Count One (paragraphs 10-16) entitled "The Means By Which the Fraud Scheme Was Carried Out." By the terms of the indictment, Mr. Phillips was implicated only in the allegations contained in paragraphs 14 and 15. At a pretrial conference on November 8, 1976, counsel for Mr. Phillips said he intended to move for a severance; however, the prosecutor represented to the Court that the evidence would show knowledge by Mr. Phillips "by explicit evidence or by a process of inference" of the other acts charged in paragraphs 10-16, not simply the acts charged in paragraphs 14 and 15. On the basis of this representation, counsel for Mr. Phillips said he was refraining from making a pretrial severance motion, and with the Court's permission reserved the right to make such a motion later if the Government's proof was not as represented. (11/8/76 Tr. 18-22)

At the conclusion of the Government's case, Mr. Phillips moved for a severance on the ground, *inter alia*, that the Government had not lived up to its pre-trial representation. At that point the Court had an investment of 3 weeks in the case, and the motion was summarily denied. (Tr. 3572) Again, after the verdict was returned, Mr. Phillips moved for a new trial pursuant to Fed. R. Crim. P. 33 on the ground, *inter alia*, that a severance ought to have been granted. This motion, too, was denied. It is respectfully submitted that these rulings were in error.

A. The Indictment

The indictment contains nine counts. Count One is a substantive count against all defendants based on section 17(a) of the Securities Act of 1933 (15 U.S.C. §77q(a)). Count Two is a substantive count against all defendants based upon section

24 of the Securities Act of 1933 (15 U.S.C. §77x). Counts Three through Eight are substantive counts against all defendants based on the mail fraud statute (18 U.S.C. §1341). Count Nine is a conspiracy count against all defendants, accusing them of conspiring to commit the acts charged in Counts One through Eight, as well as to make false statements to the Farmers Home Administration and the Securities and Exchange Commission, in violation of 18 U.S.C. §1001.

As noted above, all counts of the indictment incorporate and are based upon seven paragraphs of Count One (paragraphs 10-16) entitled "The Means By Which the Fraud Scheme Was Carried Out." Paragraph 10 charges that, in 1969, all of the defendants except Mr. Phillips falsely inflated the revenues and profits of the Stirling Homex Corporation by arranging two sales of land at artificially high prices. These prices were achieved, the indictment charges, by making concessions to the buyer, concessions which were not disclosed in registration statements filed by Stirling Homex with the SEC.

Paragraph 11 charges that, in 1970 and 1971, all of the defendants except Mr. Phillips caused Stirling Homex to prepare and file annual and interim reports which failed to disclose material facts about the sale of land referred to in paragraph 10.

Paragraph 12 charges that, in 1971, all of the defendants except Mr. Phillips falsely inflated Stirling Homex's profits and revenues by arranging a third sale of land, without disclosing in Stirling Homex's registration statements concessions made to the buyers of the land.

Paragraph 13 charges all defendants except Mr. Phillips with misrepresenting in registration statements the income received by Stirling Homex from the sale of modules.

Paragraph 14 charges that all defendants falsely inflated Stirling Homex's sales and earnings by arranging a sale of modules based on a forged commitment letter, and failed to

disclose certain material facts about this sale in Stirling Homex's registration statement.

Paragraph 15 charges that all defendants concealed from Stirling Homex's auditors material information as to adjustments in Stirling Homex's accounts.

Paragraph 16 charges all defendants except Mr. Phillips and Mr. Schulz with making false statements and material omissions in Stirling Homex's registration statement about the company's relationships with its unions.

B. The Evidence Adduced at Trial

The only evidence introduced against Mr. Phillips was evidence linking him to the Greater Gulf transaction, and the Farmers Home Administration commitment letter allegedly forged in connection with that transaction. Despite the Government's pre-trial representations, there was no evidence at all connecting Mr. Phillips to the matters charged in paragraphs 10-13 and 16 of the Indictment or even indicating his knowledge thereof. For the reasons stated below, this deficiency in the Government's proof against Mr. Phillips should have resulted in the severance of Mr. Phillips' case from the case against the other defendants.

C. The Conspiracy Count of The Indictment Charges Multiple Conspiracies

The evidence of Mr. Phillips' involvement in the matters charged in paragraphs 14 and 15 was limited to evidence of a "Mississippi transaction" entered into by Stirling Homex in which Mr. Phillips participated. There was no evidence introduced which in any way connected Mr. Phillips to the matters alleged in the other paragraphs, or to any of the matters alleged in paragraphs 14 and 15 which do not relate to this "Mississippi transaction."

These other matters make up at least five separate schemes: (1) the sale of two plots of land, and the issuance of

annual reports and registration statements concerning such sales (paragraphs 10 and 11); (2) the sale of a third plot of land, and the issuance of annual reports and registration statements concerning such sale (paragraph 12); (3) the manner of accounting for sales of modules (paragraph 13); (4) the manner of accounting for matters not involved in the "Mississippi transaction" (paragraph 15); and (5) the relations between Stirling Homex and its unions, and the issuance of registration statements concerning such relations (paragraph 16).

When an indictment charges a single conspiracy, but the evidence shows multiple conspiracies, the indictment is improper. *Kotteakos v. United States*, 328 U.S. 750 (1946). In the instant case, as noted above, paragraphs 10-16 of the indictment allege at least six different schemes, all aimed at defrauding the investing public into purchasing Stirling Homex stock. Furthermore, no evidence was introduced at trial indicating that these apparently separate schemes were, in fact, part of a single, over-all plan. Thus, it is only the common nexus of the involvement of Stirling Homex top management executives which the Government used in its attempt to draw these six different alleged schemes together into one conspiracy.

Count Nine charges, in addition, a conspiracy to make false statements to the Farmers Home Administration. The only evidence of any false statement to the Farmers Home Administration is the May 28 exchange of letters regarding the requirement of Mississippi manufacture with respect to units in the 800-unit contract. Even assuming this to constitute a "false statement" (which Mr. Phillips does not concede), there is no proof at all that Mr. Phillips made it with the intent to defraud the public or the auditors of Stirling Homex. Rather, the Government contended he meant to deceive some unnamed Farmers Home Administration official. (Tr. 6081) Thus, even if Mr. Phillips conspired to engage in the May 28 exchange, it was to an end different from the securities conspiracy charged

in Count Nine and described in paragraphs 10-16. Thus, it is a separate conspiracy.

The attempt by the Government to lump these disparate events together into one conspiracy must fail. The purpose of the schemes, assuming the Government's allegations to be true, was to make money. True, a common element—Stirling Homex stock prices—could have been affected by all the schemes. By the same token, however, a common element—narcotics—has been present in many of the recent cases of this circuit where multiple conspiracies were found to have been charged. See, e.g., *United States v. Bertolotti*, 529 F.2d 149 (2d Cir. 1975); *United States v. Miley*, 513 F.2d 1191 (2d Cir., cert. denied, 423 U.S. 842 (1975)). And in these cases, multiple conspiracies were found in spite of the fact that the Second Circuit “has gone quite far in finding single conspiracies in narcotics cases.” *United States v. Bertolotti*, *supra* at 154.

In the instant case the indictment ties Mr. Phillips, because of his alleged involvement in the “Mississippi transaction,” to a host of other alleged schemes, distant in time and place, and connected to Mr. Phillips only because of the common element of Stirling Homex. It is as if the Government could indict a gang of bank robbers for a series of robberies in New York and indict with them, in a single conspiracy count, a resident of California on the ground that he in some way aided the gang in a single robbery committed in California. This the Government may not do; see, e.g., *Kotteakos v. United States*, *supra*. By the same token, the joinder should not have been allowed here.

The case of *United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966), is instructive on this point. There, three defendants were tried on stock fraud charges. A single conspiracy was alleged. After an extended trial, all defendants were convicted. On appeal, the convictions of two defendants were affirmed, but that of the third, Shuck, was reversed. The Court of Appeals found that, while the evidence supported a finding that Shuck's co-defendants were engaged in a single, over-all conspiracy, Shuck was at most

involved in only one phase of the over-all scheme and could not be charged with participation in, or knowledge of, the larger conspiracy. The Court makes the obvious conclusion that the joinder of Shuck with the other, much more deeply involved defendants prejudiced Shuck greatly. The Court discusses several "safeguards" which could have been used to avoid this prejudice and notes the requirement, first stated in *Blumenthal v. United States*, 332 U.S. 539 (1947), that these safeguards be "impregnable," 349 F.2d at 757. The Court reviews these safeguards, states that severance is a safeguard "peculiarly applicable in this case," and concludes:

"None of these safeguards was made 'impregnable' and the most effective of them [severance] appears to have been completely disregarded." (349 F.2d at 757; emphasis supplied.)

In the instant case, as in *Kelly*, there may have been evidence to show that some defendants were engaged in a single, over-all conspiracy. However, the evidence as to Mr. Phillips was confined to the Mississippi transaction; he was not connected in any way to the other alleged schemes. *Kelly* teaches that, in such a case, a severance is a peculiarly suitable method of safeguarding such a defendant from prejudice.

D. Mr. Phillips Suffered Substantial Prejudice From the Failure to Grant a Severance

It is to be noted that, in many appellate cases dealing with multiple conspiracies, convictions have been affirmed even in the face of a finding that multiple conspiracies, rather than a single conspiracy, were proved. It is clear, however, that proof of multiple conspiracies where only a single conspiracy is charged is error; the only question is whether it is such prejudicial error as to require reversal. See, e.g., *Kotteakos v. United States*, *supra*; *United States v. Agueci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963).

The framing of the charges in this indictment was severely prejudicial to Mr. Phillips. For he, although charged with participation in only one transaction in one year and in one place, was dragged by the indictment into allegations of five or more other schemes, continuing (as paragraph 8 of the indictment charges) from January 1, 1968 to the date of filing of the indictment, carried out in places far from his home, and as to which there was absolutely no evidence that he had any knowledge. He was charged with four other defendants, all stockholders and officers of Stirling Homex (see paragraphs 3-6 of the Indictment), although he, a lawyer with an income independent of the fortunes of Stirling Homex, is alleged only to have been an "employee" of Stirling Homex and an owner of an option to purchase some restricted Stirling Homex shares. (See paragraph 7 of the indictment.) There is, therefore, a substantial risk that Mr. Phillips was wrongfully convicted as the result of his having been tried with the other defendants, whose financial ties to Stirling Homex, and therefore whose motives, were far stronger than Mr. Phillips'.

This danger was heightened in a case such as this where guilt or innocence depended to a substantial degree, *i.e.* as to all evidence other than Mr. Richardson's testimony, on the state of mind with which Mr. Phillips acted. It was heightened still further, to proportions beyond the normal run of cases, by Mr. Phillips' joinder with Harold Yanowitch and the testimony of Judith Howard Booth, Mr. Yanowitch's former secretary, as to Mr. Yanowitch's concealment of files relating to Greater Gulf (Tr. 2306), an act that would show his knowledge that the Greater Gulf transaction was fraudulent.* There is a great danger that the jury assumed that if Mr. Yanowitch and others

* Mrs. Booth also testified that Mr. Yanowitch's attorney, who represented him at the trial, had suggested to her during the SEC investigation that she destroy portions of certain stenographic pads which had been subpoenaed. (Tr. 2314) Thus not only were Mr. Phillips' co-defendants implicated in the scheme, but an attorney present at the trial was implicated as well. Such testimony necessarily had a prejudicial effect on all defendants, including Mr. Phillips.

knew the purpose of and were involved in a conspiracy, all those connected with any of the various transactions involved, particularly the Greater Gulf transaction, must have had similar knowledge. To have put Mr. Phillips in a situation where a jury might well have drawn such an improper inference was in violation of his right to be tried for his, and not others', alleged crimes. Cf. *Kotteakos v. United States*, *supra*; *United States v. Branker*, 395 F.2d 881, 888 (2d Cir. 1968), *cert. denied*, 393 U.S. 1029 (1969). This is precisely the prejudice Mr. Phillips sought to avoid during and after trial by requesting a severance. It was the anticipation of this prejudice that led him to request, on the eve of the trial, that if he was to be tried jointly with others he be tried by the Court. That request, as well, was refused when the Government would not accede to it.

Furthermore, because all but one* of the Government's witnesses relating to Mr. Phillips came from Mississippi, and because all of Mr. Phillips' fact and character witnesses (except one expert) were from Mississippi, it seems likely that, had Mr. Phillips' case been severed, he could have prevailed on a motion for change of venue pursuant to Fed. R. Crim. P. 21(b). Cf. *United States v. Clark*, 360 F. Supp. 936 (S.D.N.Y.), *mandamus denied* 481 F. 2d 276 (2d Cir. 1973). Thus the granting of a severance motion, with a resulting change of venue, would have allowed events that took place in Mississippi and were testified to by Mississippians to be judged by Mississippians—a result more consistent with the Sixth Amendment's requirement that a defendant be tried "by an impartial jury of the State and district wherein the crime shall have been committed..." The Government's misrepresentation before trial virtually insured that this result would not be reached.

Finally, the joinder is particularly prejudicial because, under the Court's *Pinkerton*** charge (Tr. 6063-6065), the jury

* Mr. Dean was from Tennessee. (Tr. 2848)

** *Pinkerton v. United States*, 328 U.S. 640 (1946).

could have found that Mr. Phillips' involvement in the May 28 exchange made him a co-conspirator with the other defendants in a plot to defraud the investing public. However, as pointed out above, there is no evidence that the defrauding of the investing public was Mr. Phillips' purpose in the May 28 exchange; the Government contended it was his intent to deceive a Framers Home Administration official into approving a contract. (Tr. 6081) Such approval, far from defrauding members of the investing public, would have been a positive benefit to them.

When, after considering all the evidence, a Court concludes that joinder of a particular defendant with others has been prejudicial, it is appropriate to grant him a new trial and a severance on a motion for a new trial following a guilty verdict. *United States v. Decker*, 51 F. Supp. 20, 25-26 (D.Md. 1943). Such relief should have been granted in this case. Failure to grant it requires a reversal and new trial.

CONCLUSION

The judgment of conviction should be reversed.

Respectfully submitted,

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